HARPAL SINGH v. GURDIAL SINGH

[O.C.J. (Rose C.J.) August 31, 1961]

[Singapore — Suit No. 1189 of 1959]

Money and Moneylending — Promissory note signed by the parties in Gurmukhi script — Whether note complied with s.5(1) of Moneylenders Ordinance (Cap. 193).

A promissory note which is in the normal printed form does not offend section 5(1) of the Moneylenders Ordinance (Cap. 193) merely because the name of the borrower is written in a language other than English.

ACTION.

K. K. Bezboruah for the plaintiff.

P. Coomaraswamy for the defendant.

Rose C.J.: When this matter came before me I entered judgment for the plaintiff for $4,800 and costs but intimated that I would give reasons later.

The facts of the case presented no difficulty. On the basis that the promissory note (Exhibit P. 1) upon which the action was founded was duly executed, judgment for the amount in question would inevitably ensue.

I accepted the evidence of the plaintiff as to the circumstances in which this note was executed and I disbelieved the defendant's version of the facts on all the matters in issue. The arrival at the figure of $4,800 therefore, became a mere matter of arithmetic.

The substantial point for the defence, however, was a technical one, namely, that the promissory note was not in compliance with section 5(1) of the Moneylenders Ordinance (Cap. 193) which was the relevant Ordinance as far as the present matter is concerned.

Section 5(1) of that Ordinance reads as follows:—

"No contract for the repayment by a borrower or his agent of money lent to him or to any agent on his behalf by a moneylender or his agent on or after the first day of January, 1936, or for the payment by him of interest on money so lent, and no security given by the borrower or by any such agent as aforesaid in respect of any such contract, shall be enforceable, unless a note or memorandum in writing of the contract in the English language be signed by the parties to the contract.....before the money is lent; and no such contract or security shall be enforceable, if it is proved that the note or memorandum aforesaid was not so signed before the money was lent or before the security was given, as the case may be:"

The note in question is in the standard printed form and is duly signed by the parties in Gurmukhi script. Learned counsel for the defendant does not contend that the fact that the signatures of the parties below the words "VALUE RECEIVED" were in that script offends against the section; but he takes the point that in the main body of the note the sub-section is offended in that its relevant part reads:

"Principal $3,500/-
Interest $140/-
One Month after date I (Signature of Defendant in Gurmukhi script) JOINTLY AND SEVERALLY PROMISE TO PAY TO....."

The contention is that the purpose of the section is to ensure that the contents of the note can be read and understood by a person familiar only with the English language and that if the name of the borrower is written in a language other than English then the intention of the sub-section is defeated.

No authority was cited to me in support of this submission which, as learned counsel himself concedes, is purely technical. To put it another way, it is a point of naked principle unadorned by merit.

In the absence of authority, I am most reluctant to arrive at what seems to me to be a highly artificial interpretation of the sub-section. On the note in question, which as I have said is in the normal printed form, all the relevant details of the transaction have been written in. The fact that the borrower sets out his own name in Gurmukhi script — and there is no dispute that the name is accurately recorded in the Punjabi language — does not, in my opinion, offend the sub-section.

It was for these reasons that I entered judgment for the plaintiff for $4,800 and costs.

Judgment for the plaintiff.

Solicitors: *K. K. Bezboruah; Braddell Bros.*

CHUA WAH KEOW v. NG HO HUAT & ANOR.

[C.A. (Tan Ah Tah, Chua and Wee Chong Jin JJ.) August 31, 1961]

[Singapore — Civil Appeal No. 14 of 1960]

Practice and Procedure — Judgment — Final order not drawn up — Recall and withdrawal of order — Principle to be applied.

An order which has not yet been perfected can be withdrawn, or altered, or modified only if to perfect it as orally pronounced would result in an erroneous order.

The plaintiff, alleging that he was the owner of a taxi, claimed damages against the two defendants for damage caused to the taxi in a collision between the vehicles of the two defendants. The plaintiff, in fact, was not the owner of the taxi but only the hirer under a hire-purchase agreement. His claim was thereupon dismissed. Subsequently, the learned trial Judge, on ascertaining that the order had not been drawn up and perfected, recalled and reheard the matter. On the suggestion of the learned trial Judge, counsel for the plaintiff applied for leave to amend his statement of claim so that it could be pleaded that the plaintiff was the bailee of the taxi. Leave was given, and after hearing argument, the learned trial Judge found the 1st defendant solely to blame and awarded damages against him. The 1st defendant appealed:—

Held: there was no doubt as to the correctness of the order of the learned trial Judge whereby the action was dismissed. That being so the learned trial Judge had not exercised his discretion properly in recalling and withdrawing the order and allowing the plaintiff to amend the statement of claim.

Cases referred to:—

(1) *The Winkfield* [1902] P. 42.
(2) *Re Harrison's Settlement* [1955] 1 All E.R. 185.
(3) *Re Australian Direct Steam Navigation Co., Miller's Case* (1876) 3 Ch. D. 661.
(4) *Re Roberts* [1887] W.N. 231.
(5) *Re Thomas* [1911] 2 Ch. 389.
(6) *Millensted* v. *Grosvenor House (Park Lane) Ltd.* [1937] K.B. 717.
(7) *Moons Motors* v. *Kiuan Wou* [1952] 2 Lloyd's Rep. 80.

COURT OF APPEAL.

H. E. Cashim for the appellant.

Tan Boon Chiang for the respondent.

Cur. Adv. Vult.

The judgment of the Court of Appeal was delivered by:

Tan Ah Tah J.: This appeal arises out of an action for damages brought by the plaintiff against the defendants in respect of damage caused to a taxi. The plaintiff had parked the taxi at the side of Choa Chu Kang Road. The first defendant drove a lorry and the second defendant drove a fire engine in the opposite direction along the same road. A collision took place between the lorry and the fire engine. As a result of the collision the fire engine collided with the taxi and damaged it. It was alleged by the plaintiff that one or both of the defendants were guilty of negligent driving and he claimed damages against them or one or other of them. The learned trial Judge found that the first defendant was solely to blame not only for the collision between the lorry and the fire engine but also the collision between the fire engine and the taxi. He therefore held the first defendant wholly responsible for the damage caused to the taxi and awarded the plaintiff the sum of $2,650 as damages against the first defendant. It is the first defendant who now appeals against the judgment of the learned trial Judge.

By his statement of claim as it was originally filed the plaintiff alleged that at all material times he was the owner of the taxi. After the trial had commenced and two witnesses had given evidence, it transpired that the plaintiff was not the owner of the taxi but merely the hirer under a hire purchase agreement. The taxi was owned by the Overseas Assurance Corporation Ltd. who had entered into the hire purchase agreement with the plaintiff. According to the evidence the Overseas Assurance Corporation Ltd. also issued a policy of insurance to the plaintiff in respect of the taxi and thereby became insurers in addition to being the owners of the taxi. After the accident it was reported that the taxi was a total wreck. The Overseas Assurance Corporation Ltd. as insurers thereupon paid out to the plaintiff the sum of $4,800 being the estimated value of the taxi immediately prior to the accident. The wrecked taxi was sold for $2,350.

Upon these facts coming to light in Court, counsel for both defendants took the point that as the plaintiff had wrongly pleaded that he was the owner of the taxi the claim must fail. After hearing argument on the point the learned trial Judge made an order dismissing the claim with costs.

It would appear that after the learned trial Judge had dismissed the claim he had occasion to read the judgment in the case of *The Winkfield*(1). He thereupon caused arrangements to be made for counsel to appear before him on the following day. Counsel duly appeared as requested, and the learned trial Judge, after ascertaining from them that the order made by him had not yet been drawn up and perfected, informed them that he proposed to recall the order and rehear the matter, citing as authority the case of *Re Harrison's Settlement.*(2) The point was then further argued by counsel. We are informed by counsel for the first defendant that, during the course of the argument, counsel for the plaintiff, adopting a suggestion made by the learned trial Judge, applied for leave to amend the statement of claim so that it could be pleaded that the plaintiff was the bailee of the taxi. Although this application was opposed by counsel for the first defendant, the learned trial Judge withdrew the order whereby the claim had been dismissed with costs, and gave the plaintiff leave to amend the statement of claim. It was thus that the plaintiff was enabled to proceed with the action and obtain a judgment against the first defendant.

One of the grounds of appeal relied upon by the first defendant, and the only one with which we propose to deal, is that the learned trial Judge did not exercise judicially his discretion to recall the order dismissing the claim with costs.

The principle relating to the power of a Judge to recall an unperfected order is stated by the English Court of Appeal in *Re Harrison's Settlement, supra* in the following terms (at p. 188) :—

> "We think that an order pronounced by the Judge can always be withdrawn, or altered or modified by him until it is drawn up, passed and entered."

It may perhaps be argued that the principle, laid down as it is in such wide terms, confers upon a Judge an unlimited power to withdraw, or alter, or modify an order made by him which has not yet been perfected. But a perusal of the cases in which the power has been exercised indicates that the power is not as untrammelled as it appears to be. In all these cases something transpired between the pronouncement of the order and the perfecting of it which showed that there was some error in the order as pronounced.

In *Re Australian Direct Steam Navigation Co., Miller's Case,*(3) which is one of the earliest reported cases on this subject, Sir George Jessel,

M.R. made an order to the effect that Miller's name be placed on the list of contributories in the winding up of the Australian Direct Steam Navigation Co., Ltd. Before the order was drawn up, the case was reheard in consequence of the attention of the Court not having been called to a relevant article of association of the company. After the rehearing, Miller's name was ordered to be removed from the list.

Another case is *Re Roberts.*[4] In that case an interpleader summons was heard in chambers by Kay J., who barred the claimant under an erroneous impression as to the facts of the case. The claimant had in fact proved his title to the goods which he claimed. No order had been drawn up. There was a motion to discharge the order, but because of the provisions of section 17 of the Common Law Procedure Act, 1860, this was not the correct procedure. Kay J. said that he had no jurisdiction, on motion, to discharge the order made in chambers, whether drawn up or not. But he went on to say that where an order had not been drawn up, whether it were an order made in chambers or in Court, the Judge had a right, if something was brought to his attention which he had not sufficiently considered, to stay the drawing up of the order and rehear the matter before making a final order. He should therefore treat the matter as if the summons were adjourned into Court, and now make an order in favour of the claimant.

In *Re Thomas*[5] an order was made in the course of an administration action by a Master in chambers confirming a conditional contract for the sale of certain land. Before the order was passed and entered, the local urban district council, which applied by way of summons for liberty to attend the proceedings, placed certain facts before the Court which showed that the conditional contract was not one which the Court could be asked to confirm. The purchaser then took out a summons asking that the order confirming the sale might be passed and entered and the sale carried into effect. It was agreed by the parties that the two summonses should be heard together, and that the case should be treated as if the summons for confirmation of the contract had been adjourned from the Master to the Judge. The case came before Warrington J., who refused to confirm the contract and directed the property to be put up for sale by auction. In the course of his judgment Warrington J. said that it was beyond dispute that, if the matter came before him on the facts which he now knew, nobody would dream of asking him to confirm the conditional contract. In a later passage of his judgment he said (at p. 396) :—

> "It is the everyday practice that, until an order is passed and entered, the matter can be brought before the Judge, and if a mistake has been made it can be put right."

The principle relating to the power of a Judge to recall an unperfected order was also stated in wide terms by the English Court of Appeal in *Millensted* v. *Grosvenor House (Park Lane), Ltd.*[6] That was a case in which Hilbery J. heard an action brought by the plaintiff in the High Court against the defendants for damages, and by his oral judgment awarded the plaintiff £50 damages. On the following day, before the judgment was drawn up and entered, Hilbery J. reduced the amount of the damages from £50 to £35. According to the report, the learned Judge said that he had given the case further serious consideration, and had come to the conclusion that the £50 damages were excessive. The report also makes it clear that it was for that reason that he awarded the plaintiff £35 damages with costs to be taxed on the county court scale. The plaintiff's appeal against this decision was dismissed by the Court of Appeal. This case, like all the other cases which have been cited, shows that the power of recalling an unperfected order was exercised by the trial Judge because of an error in the order as orally pronounced by him. So does the case of *Moons Motors, Ltd.* v. *Kiuan Wou,*[7] where a county court Judge changed his mind after hearing further argument, and his final decision was upheld by the Court of Appeal.

In *Re Harrison's Settlement, supra,* Roxburgh J. recalled the order made by him when it became clear after the decision of the House of Lords in *Chapman* v. *Chapman*[8] that it was based on an interpretation of the law which had been shown to be wrong. The following passage from the judgment of the Court of Appeal in *Re Harrison's Settlement* (at p. 192) is relevant to the point under consideration:—

> "It is important to remember that in the ordinary way the recall of an unperfected order results in a rehearing at which all parties can present such further arguments as they may be advised having regard to the matter, whatever it may be, which is sought to cast doubt on the correctness of the order as orally pronounced. But in the present cases the parties found it impossible to contend that the schemes were such as could properly be sanctioned by the Court since the decision of the House of Lords in *Chapman* v. *Chapman, supra,* and accordingly did not avail themselves of the rehearing offered by Roxburgh J."

It is to be observed from this passage that an unperfected order is recalled when there is some doubt regarding the correctness of the order as orally pronounced.

In the present case we do not think there was any doubt regarding the correctness of the order whereby the action was dismissed. The plaintiff had wrongly pleaded that he was the owner of the taxi. The defendants were entitled to know in which capacity the plaintiff was bringing the action. The plaintiff could not be allowed to sue in one capacity and succeed in another. When the learned trial Judge made the order he was in possession of all the relevant facts. The decision in *The Winkfield, supra,* could have no effect on the rules of pleading. In our view, the order of the learned trial Judge

dismissing the action was unquestionably right. That being so, we do not think it was a correct exercise of his discretion when he recalled the order and withdrew it and then allowed the plaintiff to amend the statement of claim.

In our judgment, an order which has not yet been perfected can be withdrawn, or altered, or modified only if to perfect it as orally pronounced would result in an erroneous order.

For the reasons which we have given, the appeal is allowed and the plaintiff's claim against the first defendant dismissed with costs. The order directing the first defendant to pay to the plaintiff the costs payable by the plaintiff to the second defendant is set aside. The plaintiff will pay the costs of this appeal to the first defendant and the second defendant, a person affected by these proceedings.

Appeal allowed.

Solicitors: *Rodyk & Davidson; Laycock & Ong.*

WONG MING KIONG v. CHOH JIN & ORS.

[C.A. (Thomson C.J., Hill and Good JJ.A.) August 31, 1961]

[K.L. — F.M. Civil Appeal No. 73 of 1960]

Negligence — Running down case — Collision between omnibus and cyclist — Duty to avert accident.

Evidence — Question of credibility.

In this case there was a collision between an omnibus and a cyclist. It was contended on appeal that the learned trial Judge should have found that the omnibus driver saw the cyclist at a time when he could have averted the accident.

Held: the question whether the driver saw the cyclist was primarily a question of credibility, although in assessing credibility the question of inherent probability must also arise. The learned trial Judge clearly preferred the evidence of the omnibus driver as a matter of credibility to that of the cyclist. The evidence of the driver was consistent with all the probabilities of the case and the appeal must therefore be dismissed.

Case referred to:—

(1) *Daly* v. *Liverpool Corporation* [1939] 2 All E.R. 142, 143.

COURT OF APPEAL.

S. P. Seenivasagam for the appellant.

P. Mooney for the respondent.

Thomson C.J. (delivering oral judgment): This is an appeal from a decision of Mr. Justice Ong in a running down case. It is perhaps significant to observe that the incident from which the case arose took place in November 1957 and the case itself was not tried until December 1960, that is over three years later.

The case arose out of an incident which occurred on the morning of 10th November, 1957, at Simpang Lima, Klang, which is what is popularly known as a roundabout, on the main road leaving Klang for Port Swettenham. There and then there was a collision between an omnibus belonging to the second respondent and driven by the first respondent, who was the servant of the second respondent and engaged in his ordinary business on the one side and on the other side by the appellant a young man who at the material time was riding a bicycle.

It is common ground, I think, that the appellant, accompanied by two playmates, entered the roundabout from the direction of Klang town with the intention of leaving it by Jalan Raja West. Some time after the appellant had entered the roundabout, he crossed over the road from the outer perimeter of the roundabout to the inner perimeter. I think it is further agreed that this was a very dangerous and a very risky thing to do. While he was performing this manoeuvre he was overtaken and run down by an omnibus driven by the first respondent, and it is said, I hope this is not putting the appellant's case unfairly, that the consideration that the appellant, the cyclist, behaved negligently led the trial Judge to overlook the fact that there was also negligence on the part of the omnibus driver and that that negligence was similar to that in the case of *Daly* v. *Liverpool Corporation.*(1)

What happened in *Daly's* case, which was a case where a motor-bus ran down a pedestrian while crossing a busy street in Liverpool, was thus stated by Mr. Justice Stable:—

> "He (that is the bus driver) saw the plaintiff at a time when he could have averted this accident."

It was urged upon us that in the present case the trial Judge should have found that the omnibus driver saw the cyclist at a time when he could have averted the accident and if that was so it followed from what was said in *Daly's* case that the respondents were liable for negligence.

In the present case the question of when the driver saw the cyclist is primarily a question of credibility although, of course, in assessing credibility the question of inherent probability must also arise. It is perfectly clear that the trial Judge who heard the evidence of the cyclist and his playmates on the one hand and who heard the evidence of the driver on the other hand preferred the evidence of the driver. What the driver said was this (I am reading from his examination in chief and I do not think anything here was shaken in cross-examination):—

> "As I reached the roundabout I looked to my right, saw road clear, changed down from top to 3rd gear, and then proceeded, at about 15 m.p.h."